

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CORY M. CRAIN.

No. 2:20-cv-00006 GGH P

Petitioner,

V.

UNITED STATES DISTRICT COURT.

Respondent.

ORDER AND FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has not, however, filed an in forma pauperis affidavit or paid the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). Petitioner has filed a motion for an extension of time to file a motion to proceed in forma pauperis. ECF No. 3. The undersigned will deny the motion for an extension of time as moot given the following recommendations that this case be dismissed without prejudice for failure to exhaust state remedies.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion, thus, may

¹ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

1 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the
2 highest state court with a full and fair opportunity to consider all claims before presenting them to
3 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
4 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

5 After reviewing the petition for habeas corpus, the court finds that petitioner has failed to
6 exhaust state court remedies. In his habeas petition, petitioner requests as his single ground for
7 relief: resentencing pursuant to California Senate Bill 136. ECF No. 1 at 3. This claim has not
8 been presented to the California Supreme Court. Further, there is no allegation that state court
9 remedies are no longer available to petitioner. Accordingly, the petition should be dismissed
10 without prejudice.²

11 Good cause appearing, IT IS HEREBY ORDERED that:

- 12 1. Petitioner motion for extension of time (ECF No. 3) is denied as moot; and
13 2. The Clerk of the Court assign a district judge to this action.

14 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas
15 corpus be dismissed for failure to exhaust state remedies.

16 These findings and recommendations will be submitted to the United States District Judge
17 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, petitioner may file written
19 objections with the court. The document should be captioned "Objections to Findings and
20 Recommendations." Petitioner is advised that failure to file objections within the specified
21 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
22 (9th Cir. 1991).

23 Dated: January 24, 2020

24 /s/ Gregory G. Hollows
25 UNITED STATES MAGISTRATE JUDGE

26 _____
27 ² Petitioner is cautioned that the habeas corpus statute imposes a one-year statute of limitations
28 for filing non-capital habeas corpus petitions in federal court. In most cases, the one-year period will start
to run on the date on which the state court judgment became final by the conclusion of direct review or the
expiration of time for seeking direct review, although the statute of limitations is tolled while a properly
filed application for state post-conviction or other collateral review is pending. 28 U.S.C. § 2244(d).